Filed 6/22/12 Rasheed v. Banning U. Sch. Dist. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SOFIA RASHEED, a Minor, etc., Plaintiff and Appellant, v. BANNING UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	E053727 (Super.Ct.No. RIC10000565) OPINION

APPEAL from the Superior Court of Riverside County. Paulette Durand-Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Office of Zulu Ali and Zulu Ali for Plaintiff and Appellant.

Declues Burkett & Thompson, Jeffrey A. Smith and Steven J. Lowery for Defendants and Respondents.

On February 2, 2009, plaintiff and appellant Sofia Rasheed attended her eighth grade history class. She was chewing gum despite knowing classroom rules forbade it. Her teacher, defendant and respondent Robin Hennen, told her, "'You remind me of a prostitute chewing her gum.'" Plaintiff immediately swallowed the gum. Plaintiff averred she thereafter began seeing a psychiatrist every other week to deal with the emotional trauma she sustained from the remark.

Plaintiff filed a complaint against Hennen, and defendant and respondent Banning Unified School District (Banning) alleging causes of action for intentional tort (defamation) and negligence. Banning moved for summary judgment on November 19, 2010. Hennen moved for summary judgment on February 16, 2011. On February 22, 2011, the court granted Banning's motion for summary judgment. Plaintiff moved for reconsideration. The court denied plaintiff's motion for reconsideration and granted Hennen's motion for summary judgment. The court entered final judgment on July 8, 2011.

On appeal, plaintiff contends the court erred in granting both Banning and Hennen's motions for summary judgment. In addition, plaintiff maintains the court erroneously denied her motion for reconsideration of the order granting Banning's motion for summary judgment. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff averred she understood Hennen's words to mean that she was being called a prostitute, and her classmates also understood them as such. Plaintiff was subjected to ridicule and had to go to treatment. In ruling on Banning's motion for

summary judgment, the court noted, "I don't have evidence, admissible evidence, regarding other students and what they understood and what they heard. I can't tie that comment to a want of chastity . . . ." "[W]hat I have in terms of evidence is I have the plaintiff's statement, how she accepted this, and I don't have other students declarations or any evidence." "I don't have the other classmates. I don't have any other evidence." Moreover, the court opined that "when I look at the quote, 'You remind me of a prostitute chewing her gum,' it doesn't say, you look like a prostitute."

With respect to Banning's motion for summary judgment, the court noted that while it did "not find the comment particularly appropriate, . . . neither does the Court find the comment, on its face, imputing a want of chastity." The court sustained Banning's objection to plaintiff's understanding of what other students thought Hennen's statement meant. The court noted it had "no admissible evidence to indicate that any third party understood the statement as slanderous." Moreover, the court noted "[t]he evidence, as submitted, appears to acknowledge that Plaintiff knew what Ms. Hennen meant with the comment, as deposition testimony indicated that after the statement was made, Plaintiff swallowed her gum." Furthermore, the court found there was no authority for a claim of negligent defamation.

On March 4, 2011, plaintiff moved for reconsideration of the court's order granting Banning's motion for summary judgment. Plaintiff's basis for moving for reconsideration was new evidence consisting of the declarations of two students claiming they understood Hennen's words to mean she was calling plaintiff a prostitute. Defense counsel alleged he "did not mention the new evidence at the February 8, 2011[,] hearing

because at that time I was unaware that these witnesses were available and willing to provide statements regarding Ms. Hennen. The declarations from these witnesses were not available until after the court had ruled on the motion for summary judgment." One of the declarations read "I, Miguel Angel Aispuio [w]as a student at Nicolet Middle School in Banning Unified School District on February 2 when I witnessed the teacher Ms. Hennen refer to Sofia Rasheed as a prostitute. I understood Ms. Hennens words to mean that Sofia Rasheed was a prostitute." The other was virtually identical: "I, Ben Rivera [w]as a student at Nicolet Middle School in Banning Unified School District on February 2 when I witnessed the teacher Ms. Hennen refer to Sofia Rasheed as a prostitute. I understood . Ms. Hennens words to mean that Sofia Rasheed was a prostitute."

In plaintiff's reply to Banning's opposition to the motion for reconsideration, plaintiff attached another declaration from an Eric Ceja. The declaration read, "I was a student at Nicolet Middle School . . . on February 2, 2009. I was in the U.S. history class on February 2, 2009, where Sofia Rasheed was also a student, and where Ms. Hennen . . . was the teacher. [¶] I heard Ms. . . . Hennen say the following words to Sofia Rasheed: 'When you pop the gum you sound like a prostitute'. I understood the words to mean that Sofia was being called a 'prostitute'. I understand that the word 'prostitute' means a person who sells her body. I understood that Ms. Hennen was saying that Sofia sounded like a prostitute." Plaintiff attached all three students' declarations to her opposition to Hennen's motion for summary judgment.

At the hearing on Banning's motion for reconsideration, the court noted plaintiff failed to explain why she could not have obtained the declarations at an earlier time: "You knew who the class group was. Your client was in the class." The court stated that if plaintiff needed more time to obtain the declarations, she should have requested more time. The court took the matter under submission, but denied the motion later that day.

With respect to Hennen's motion for summary judgment, the court noted, again, that plaintiff evidenced recognition as to what Hennen's comment referred when plaintiff swallowed her gum. "As to . . . negligence, I don't know of any case that tells me that there should be a negligence defamation cause of action." "I don't find any case law that says that the teacher's statements to a student in a classroom are going to create a negligence claim." The court took the matter under submission.

On May 26, 2011, the court granted Hennen's motion for summary judgment. In its statement of decision, the court found that "[b]ased on the evidence submitted, and the context in which the statement was made, the Court does not find the statement actionable." Moreover, the court found "no cause of action stated in negligence based on the utterance of the statement itself."

DISCUSSION

A. MOTIONS FOR SUMMARY JUDGMENT

Plaintiff contends the court erroneously granted the motions for summary judgment of Banning and Hennen, because Hennen's statement could be perceived as imputing plaintiff's want of chastity and, thus, presented a triable issue of fact. Moreover, even if Hennen's statement could not be interpreted as an intentional attempt

to impugn plaintiff's chastity, the evidence plaintiff produced reflected that it had such an effect sufficient to preserve plaintiff's negligence claim as a triable issue. We disagree.

"'[O]n appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.' [Citation.]" (*Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 534) "We review de novo a trial court's grant of summary judgment along with its resolution of any underlying issues of statutory construction. [Citation.] A trial court may only grant a motion for summary judgment if no triable issues of material fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The evidence must be viewed in the light most favorable to the nonmoving party. [Citation.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

1. *DEFAMATION*

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. [Citation.]" (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1369.) "The crucial question in this case is whether the statement at issue was a statement of fact or a statement of opinion. This is a question of law to be decided by the court. [Citations.] In making such a determination, the court must place itself in the position of the hearer or reader, and determine the sense or meaning of the statement according to its natural and popular construction. [Citation.] '"That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law,

but by the natural and probable effect upon the mind of the average reader."' [Citation.]" (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.)

"A statement is not defamatory unless it can reasonably be viewed as declaring or implying a provably false factual assertion [citation], and it is apparent from the 'context and tenor' of the statement 'that the [speaker] seriously is maintaining an assertion of actual fact.' [Citation.]" (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344.) "When one states a view in terms of an 'impression,' the listener or reader is on notice that the maker is not vouching for its accuracy. A reasonable person would understand that a statement of opinion rather than of fact was to follow." (*Baker v. Los Angeles Herald Examiner, supra*, 42 Cal.3d at pp. 261-262.)

Here, Hennen's statement "'You remind me of a prostitute chewing her gum'" is not, as a matter of law, a provably false factual assertion of fact. No one can prove that the style in which plaintiff chewed her gum did not remind Hennen of the manner in which a prostitute might chew her gum. Moreover, Hennen's statement cannot be regarded as actually calling plaintiff a prostitute. First, Hennen only said that plaintiff reminded her of a prostitute by the manner in which she chewed her gum; she did not either implicitly or explicitly impugn plaintiff's sexual chastity. Second, Hennen's comment was directed at attempting to remedy plaintiff's violation of the classroom rule against chewing gum; this she succeeded in doing, as plaintiff immediately swallowed her gum. Thus, even plaintiff's own declaration adduced evidence that she herself understood the true gist of Hennen's remark.

Plaintiff argues that we must consider the audience to which the remark was addressed: a classroom full of young, impressionable, eighth grade students. Plaintiff argues her attachment of three declarations to subsequent pleadings, presumably all from members of the class that heard Hennen's remarks, averring the students regarded Hennen's statement as calling plaintiff a prostitute, demonstrates that in the context of an eighth grade classroom, the students obviously did regard the comment as imputing plaintiff's chastity. However, regardless of plaintiff's classmates asserted interpretations of Hennen's comment, there is still simply no way any reasonable 13 year old could interpret the statement as an objective statement of fact that plaintiff was a prostitute. Hennen never said plaintiff was a prostitute; she never said plaintiff engaged in the defining activities of a prostitute; rather, she merely implied that plaintiff's gum chewing was reminiscent, in Hennen's mind, of how a prostitute chews gum. Although we agree with both defendants' counsels, and the trial court below, that Hennen's comment was inappropriate, we cannot say it rose to the level of defamation.

2. *NEGLIGENCE*

We agree with plaintiff that defendants were not immune from a suit for negligence. Schools and their employees "do owe plaintiff a duty to use the degree of care which a person of ordinary prudence, charged with comparable duties, would exercise in the same circumstances. [Citation.]" (*Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1459.) Nevertheless, we disagree with plaintiff regarding the scope of that duty: "Of course, in the present circumstances, the existence of a duty of care depends in part on whether the harm to plaintiff was reasonably foreseeable.

[Citation.]" (*Ibid.*) "[T]he scope of defendants' duty, and the existence of duty is a pure question of law . . . ." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 363; *Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 958.)

"'Since the existence of a duty of care is an essential element in any assessment of liability for negligence [citations], entry of summary judgment in favor of the defendant in a negligence action is proper where the plaintiff is unable to show that the defendant owed such a duty of care.' [Citation.] The determination that a legal duty is owed in a particular set of circumstances is '"'only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'"' [Citation.]" (*Walker v. Sonora Regional Medical Center*, *supra*, 202 Cal.App.4th at p. 958, fn. omitted.)

Here, as discussed above, Hennen's statement did not rise to the level of defamation; yet, plaintiff contends a triable issue of fact remained as to whether Hennen's statement negligently inflicted the emotional damages sustained by plaintiff. We hold that no cause of action for negligence exists against a teacher where her statement to a student does not rise to the level of defamation. To hold otherwise would be to permit a cause of action for any comment made by a teacher that unintentionally hurt the child's feelings and/or was subjectively perceived by her classmates to result in ridicule of the student.

As the trial court implied, teachers do not have a duty to be "nice." Moreover, the First Amendment implications are staggering, as a contrary holding would significantly chill teachers' freedom to communicate with their students. Finally, the procedural

hurdles faced by school districts alone would make such rule impractical because school districts could not be expected to compile examples of all prohibited statements that might offend a student or subject her to ridicule. Neither could school districts be expected to constantly supervise their teachers to ensure compliance with any rule book of impermissible comments. We hold that although Hennen owed plaintiff a duty of care, the scope of that duty did not extend to the unforeseeable consequence that her non-defamatory statement would subject plaintiff to emotional distress and ridicule. Thus, defendants established there was no triable issue of material fact and were entitled to summary judgment.

B. MOTION FOR RECONSIDERATION

Plaintiff contends the court erroneously denied her motion for reconsideration of the order granting Banning's motion for summary judgment. We disagree.

"Section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. [Citation.] A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard. [Citation.]" (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.)

Plaintiff based its motion for reconsideration on the "newly discovered evidence" of the three student declarations averring that they regarded Hennen's statement as calling plaintiff a prostitute. Defense counsel asserted, "I did not mention the new evidence at the February 8, 2011, hearing because at that time I was unaware that these

witnesses were available and willing to provide statements regarding Ms. Hennen. The declarations from these witnesses were not available until after the court had ruled on the motion for summary judgment." However, as the court noted, plaintiff knew who was in class, because she was in the class herself. Thus, it is difficult to understand why counsel could not have contacted the class members at an earlier time and requested such declarations.

Indeed, the name and phone number for one of the students who submitted a declaration was included in plaintiff's response to special interrogatories dated May 27, 2010, nearly eight months prior to plaintiff filing her opposition to Banning's motion for summary judgment, and at least nine and a half months prior to her eventual submission of those declarations. Likewise, the name of another student who appears to have submitted a declaration was also included in the same response. Plaintiff failed to provide any satisfactory explanation for her failure to obtain the declarations at an earlier time.

Moreover, as the court noted, even if plaintiff was having difficulty obtaining the declarations, plaintiff could have requested an extension of time to obtain them; this plaintiff never did. Plaintiff never even indicated they were seeking such declarations. Finally, as discussed above, the declarations are largely irrelevant to both our and the trial court's determination that no triable issue of fact existed. Thus, the court acted within its discretion in denying plaintiff's motion for reconsideration.

DISPOSITION

The judgment is affirmed. In the interest of justice, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

KING
J.